IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SUIT NO.2630 OF 1988

M/s.Narandas Mathuradas Narielwala..Plaintiffs

Versus

1. Nitco Roadways Private Limited

2. Roshanlal Bhalla of Jammu ...Defendants

Mr. Mukund Tally i/b. M/s. S. Mahomedbhai & Co. for the Plaintiffs
Mr. M.P. Vashi for the Defendants

CORAM : S.R. SATHE,J.
DATED : 16th APRIL,2007

ORAL JUDGEMENT :-

1. Plaintiffs have filed this suit against the defendants for recovery of the amount of Rs. 7,94,900/- due from the defendants as per clause-14 of the agreement executed between Plaintiffs and defendants on 21/02/1972 and future interest on the said amount at the rate of 18% per annum from the date of the filing of the suit till realization of the amount.

2. The brief facts giving rise to this suit are as under :-

The Plaintiff is a registered partnership firm carrying on business as warehousing agent, government

supplier, importers and exporters. The first defendant is a private limited company incorporated under the provision of Company's Act 1956 and doing business as transporters and public carriers.

3. In the year 1972, godown admeasuring 1410 sq.fts. situated at Chaturbhuj Nivas, 70, Vadgadi, Bombay described in detail in schedule-A attached to the plaint was in possession of the Plaintiffs as tenant. In February-1972, the defendant No.1 requested Plaintiff to grant to defendant No.1 the facility for storage of goods belonging to first defendant or its client in the said godown. Plaintiff agreed to permit the first Defendant to store its goods in the godown and accordingly, agreement was executed between Plaintiff and defendant on 21/02/1972 (Exh-C). As per the terms and conditions of the said agreement, the defendant No.1 agreed to pay amount of Rs. 120/- per day to the Plaintiff for the storage of the goods. It was also agreed that the godown shall be kept open from 9.30 am to 9.30 pm on all working days and the defendant No.1 shall have access to the said godown only during the said period. It was further agreed to pay the storage charges every week and the first of such payment was to be made before 21/02/1972. As per

the said agreement, both the parties were at liberty to terminate the agreement by serving upon the other, one week previous notice in writing. Besides this, it was also agreed that on breach of any of the terms of the said agreement the Plaintiffs are having a right to terminate the agreement by giving notice of 24 hours. It was further agreed that on termination of the agreement accordingly if the defendant No.1 fails to remove the goods from the godown then the defendant No.1 would be liable to pay liquidated damages at the rate of Rs. 250/- per day from the date of expiry of the period of such notice of termination until all the goods kept or stored by the said company in the said godown are removed therefrom.

4. On 15/12/1978, the Plaintiffs informed the defendants by letter that by reason of the fact that the building in which the said godown was situated was undergoing repairs, the defendants should remove their goods lying in the said godown and should not store their good in future. Inspite of the receipt of the said notice the defendant No.1 neither stopped using godown nor replied the notice. They also did not pay the storage charges after December-1978. On the contrary, the defendants filed declaratory Suit No.1232

of 1979 on 09/03/1979 in the Small Causes Court at Bombay seeking declaration that the defendant No.1 is a protected licensee or deemed tenant. However, the defendant No.1 failed to obtain any relief in the Court of Small Causes at Bombay. The defendant No.1, therefore, filed suit No.1431 of 1983 in the City Civil Court, Bombay. The defendant No.1 moved notice No.5256 of 1985 in Miscellaneous Application Notice No.400 of 1985 in Suit No.1232 of 1979 and sought credit for the amount allegedly paid by defendant to Bhadut Mandal of the said Building i.e. Rs. 1,06,000/- and Rs. 1,21,500/- which were deposited by defendant No.1 in the Small Causes Court by order dated 10/09/1985. The Small Causes Court accordingly directed to give the credit of the said amount to defendant No.1 and also further directed to pay the balance to make the total of Rs. 2,91,600/- and further directed defendant No.1 to deposit Rs. 120/- per day since 02/09/1985 till restoration of the application. Thus, there were several proceedings between parties. According to Plaintiffs, the defendant No.1 had failed to pay amount of Rs. 250/- per day as agreed from 01/01/1979. He, therefore, filed the present suit. In this suit, defendant No.2 was also implicated because as per the agreement dated 21/02/1972 the defendant No.2 had

personally undertaken that on defendant No.1 failing to pay the amount as per the agreement, the same will be paid by him.

5. The defendant No.1 had deposited amount of Rs. 25,000/- by way of deposit or security with Plaintiffs, as per the terms of the agreement. Hence, Plaintiffs appropriated the said amount towards his dues and also appropriated the amount paid by the defendants to Plaintiffs on or about 26/10/1985 as per the order of the Court i.e. amount of Rs. 64,100/- and finally claimed the amount of Rs. 7,94,900/- from the defendant Nos. 1 and 2.

6. The defendants failed to file Written Statement though sufficient opportunity was given to them and hence the matter proceeded without written statement.

7. From the perusal of the record, it appears that subsequently the defendant No.1 filed Chamber Summons to set aside the order regarding the proceeding the suit without written statement. However, the same was rejected and Plaintiff was directed to file evidence to prove the suit claim. Accordingly, he filed the affidavit of evidence in lieu of examination in chief

and he was allowed to be cross-examined by the defendants.

8. The defendants have not filed their Written Statement and thus they have in fact not resisted the Plaintiff's suit by taking any specific contention. However, from the cross-examination of the Plaintiff's witness Niranjan Nariealwala who has filed the affidavit, it appears that it is the grievance of the defendants that the amount claimed by the Plaintiff is false and exaggerated. Besides this, the godown is demolished in 2004 and so there is no question of securing possession of the said godown by the Plaintiffs. Even the Plaintiff has also stated that he is not insisting for possession of the godown.

9. The only question that therefore false for consideration in the suit is whether Plaintiff is entitled to recover the amount as claimed in the plaint. It is crystal clear that there is no dispute between the Plaintiffs and the defendants regarding the execution of the agreement dated 21/02/1972 Exh-C and its terms and conditions. From the perusal of the said agreement it is very clear that after the termination of the agreement the defendant No.1 was liable to pay

the damages at the rate of Rs. 250/- per day, on his failure to remove the goods within 8 days from the notice of termination of the agreement. It is not in dispute that the Plaintiff issued letter dated 15/12/1978 and terminated the agreement in question. Admittedly, even thereafter, the defendant No.1 did not remove the goods from the godown. Naturally, as per the terms of the agreement Plaintiff is entitled to recover the amount of compensation as mentioned in the agreement.

10. Though it is tried to be suggested that the said amount claimed by the Plaintiff is false and exaggerated, it must be mentioned that as there are no pleadings to that effect made by the defendants they are not entitled to raise such plea. Moreover, once the execution of the agreement is not disputed then the amount of Rs. 250/- which is mentioned therein has to be paid by the defendant as the agreement in question was terminated by issuance of letter dated 15/12/1978.

11. Shri Vashi, learned Senior Advocate for the defendant argued before me that in the instant case in order to prove the suit claim it was necessary for the Plaintiff to produce his books of accounts, but as he

has failed to do so, plaintiff is not entitled to recover the said amount. However, it must be noted that this is not a suit based on accounts. Plaintiff is only claiming damages as agreed in the agreement. So, non production of books of accounts is certainly not fatal to the Plaintiff's claim and there is no substance in the argument advanced by the learned Senior Advocate for the defendant in this behalf.

12. It was tried to be argued on behalf of the defendant that for recovery of the amount of Rs. 250/- it was in fact necessary to have some inquiry as contemplated under Order-20, Rule-12 of CPC because according to defendants the said amount is being claimed as mense profit. However, if we take into consideration the facts and circumstances of the case it is crystal clear that the amount claimed by the Plaintiffs can not be said to be an amount of mesne profit. He has claimed the amount strictly in pursuance of the stipulation in the agreement dated 21/02/1972. The amount of Rs. 250/- per day is quantified by way of liquidated damages. So, there is no substance in the argument advanced in this behalf.

13. Naturally, the only point which has to be

considered in this case is whether the claim of the Plaintiff regarding arrears of amount or the damages from 01/01/1979 is in time, when admittedly the present suit is filed on 05/09/1988. While considering this aspect the learned Advocate for the Plaintiff submitted that this is a suit filed under Article-55 of the Limitation Act and as such the present case is in respect of recovery of damages in respect of continuing breach and hence, the suit is in time. The article-55 of the Limitation Act says :-

	Description of suit	***Period of limitation***	***Time from which period begins to run***
55	***For compensation for the breach of any contract, express or implied, not herein specially provided for.***	***Three years***	***When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (where the breach is continuing) when it ceases.***

From the perusal of the above article it is very clear that the period of limitation of 3 years starts from the day when the breach occurred. In the instant case, when the amount of Rs. 250/- was to be paid per day, it has to be held that the cause of action for the same arose on each day and it can not be said that this is a case of continuing breach. So, I have no hesitation to hold that the period of limitation is 3 years from the day when defendant No.1 failed to pay

the amount of Rs. 250/-. So, normally it can be said that Plaintiff is entitled to recover the amount for the period of 3 years immediately preceding the date of filing of the suit i.e. since 05/09/1985. However, it is pertinent to note that in the instant case, admittedly, there were various judicial proceedings filed by both the parties against each other wherein also Plaintiff had raised claim with regard to recovery of the amount which defendant No.1 had undertaken to pay as per the agreement. Not only that but it does appear that the Small Causes Court at one point of time had in fact directed to deposit at the rate of Rs. 120/- per day and defendant had in fact deposited the same. Similarly, it is an admitted fact that by order in Notice No.5256 of 1985 in RAD No.1232 of 1979 on 10/09/1985, Small Causes Court had directed to give credit of Rs. 1,21,500/- and Rs.1,0,6000/- paid by the defendant to Badhut Mandal. So, the said amount can be adjusted towards the dues that were due to the Plaintiff till that order. Incidently, it must also be noted that admittedly even this Court (CORAM : H. SURESH, J.) passed order on 10/08/1990 in Notice of Motion No.2502 of 1988 in suit No.2630 of 1988 (present suit) whereby the defendant was directed to pay the amount at the rate of Rs. 130/- per day in the High

Court as the amount at the rate of Rs. 120/- per day was only being deposited in the Small Causes Court. If some amount is deposited by the defendants prior to the filing of the suit or if some amount paid by the defendants which Plaintiff had not taken into consideration while calculated his dues then when the Court directed the Plaintiff to give credit to defendants for the amount of Rs. 1,21,500/- and Rs.1,06,000/- i.e. total Rs.2,27,500/-, it must be held that out of the dues that were shown due on 05/09/1985 the amount to the extent of Rs. 2,27,500/- was already received and taking into consideration the said amount, one can say that the period covering the said amount if calculated on the basis of Rs.250/- per day comes to 2 years, 7 months and 9 days. The said period is to be deducted from 05/09/1985. So, in other words, it can only be said that though Plaintiff has claimed the dues from 01/01/1979 the dues from that day till 28/02/1982 are time barred and Plaintiff is entitled to receive the amount from 01/03/1983.

14. So, taking into consideration the above discussion let us find out the exact amount that was due to Plaintiff on the date of filing of the suit.

15. The amount due from 01/03/1983 to the date of

filing of the suit at the rate of Rs. 250/- per day i.e. Rs. 5,03,500/-. Out of the said amount, if we deduct the amount already received or for which the Plaintiff was bound to give credit to the defendants i.e. Rs.3,11,600/- (Rs.1,21,500/- + Rs.1,06,000/- + Rs.64,100/- + Rs.20,000/-) Hence, I pass the following order :-

O R D E R

1. It is hereby declared that the agreement dated 21/02/1972 executed between Plaintiffs and defendants (Exh-C) to the plaint stands terminated vide letter dated 15/12/1978 issued by Plaintiffs to defendants.

2. The defendant Nos. 1 and 2 to pay to Plaintiffs Rs. 1,91,900/- and future interest on the said amount at the rate of 6% per annum from the date of the suit till realization of the amount.

3. The defendant Nos. 1 and 2 to pay Plaintiffs the proportionate costs of this suit and bear their own.

(S.R. SATHE,J.)